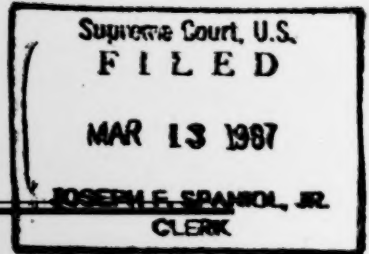


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No. _____

**In The
Supreme Court of the United States**

OCTOBER TERM, 1986

DOMNICK J. SORISE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION TO WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Lower Court Entitlement:

**IN RE: GRAND JURY SUBPOENA
NO. 86-1-52-37 (DOMINIC J. SORISE)**

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

The Petitioner, DOMNICK J. SORISE, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 31, 1986, Petition for Rehearing denied on January 23, 1987.

QUESTIONS PRESENTED FOR REVIEW

I.

WHERE A UNITED STATES ATTORNEY GETS A STATUTORY COMPULSION ORDER FOR USE IMMUNITY, PURSUANT TO 18 U.S.C. §6001 *et seq*, DOES NOT SERVE THE ORDER, BUT SUBSEQUENTLY ENTERS INTO AN INFORMAL LIMITED USE IMMUNITY AGREEMENT RESTRICTING HIS QUESTIONING, AND THERE IS FULL COMPLIANCE BY THE WITNESS, CAN THE UNITED STATES ATTORNEY THEN ATTEMPT TO ABBROGATE THE INFORMAL IMMUNITY AGREEMENT AND HOLD THE WITNESS IN CONTEMPT BY SERVING THE ORIGINAL ORDER?

II.

DOES A POTENTIAL GRAND JURY WITNESS HAVE A RIGHT TO CONTINUE HIS FIFTH AMENDMENT PRIVILEGE AND TO REFUSE TO ANSWER QUESTIONS PUT FORTH BY THE GRAND JURORS THEMSELVES, WHEN SAID QUESTIONS WERE SPECIFICALLY EXCLUDED BY A LIMITED USE IMMUNITY AGREEMENT BETWEEN THE UNITED STATES ATTORNEY REPRESENTING THE GRAND JURY AND THE PETITIONER?

TABLE OF CONTENTS

	PAGE
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT	ii
QUESTIONS PRESENTED FOR REVIEW	ii
INDEX OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	1
REASONS FOR GRANTING THIS WRIT	4
<div style="margin-left: 20px;"> A. THE QUESTION OF THE RELATIONSHIP THAT THE UNITED STATES ATTOR- NEY'S OFFICE HAS TO A GRAND JURY BODY AS TO WHETHER OR NOT HE CAN BARGAIN IN THEIR BEHALF AND WHETHER OR NOT AN INDIVIDUAL WITNESS HAS THE RIGHT TO RELY ON THAT BARGAIN, HAS NOT BEEN FOR- MALLY ANSWERED BY THIS COURT AND IS AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING GRAND JURIES. </div>	
STATEMENT OF CASE	4
REASONS FOR GRANTING THE WRIT	9

INDEX OF AUTHORITIES

CASES	PAGE
<i>Blair v United States</i> , 250 U.S. 273, 39 S.Ct. 468, 471, 63 L.Ed 979 (1919)	12, 24
<i>Branzburg v Hayes</i> , 408 U.S. 665, 92 S.Ct. 2646, 2659, 33 L.Ed2d 626 (1972)	12, 21
<i>Bursey v United States</i> , 466 F.2d 1059, 1074 to 1075 (9th Cir. 1972)	15
<i>Cooper v United States</i> , 594 F.2d 12, 16-18, (4th Cir. 1979)	20
<i>Dixon v Alexander</i> , 741 F.2d 121 (6th Cir. 1984) ...	20
<i>Ellis v United States</i> , 416 F.2d 791, 796-797 (D.C. Cir. 1969)	15
<i>Robert Hawthorne, Inc. v Director of Internal Revenue</i> , 406 F.Supp. 1098, 1119 (E.D. PA 1976)	14
<i>Heckler v Chaney</i> , 105 S.Ct. 1649 (1986)	18
<i>In Re Grand Jury Proceedings</i> (Schoofield), 486 F.2d 85, 90 (3rd Cir. 1973)	13, 24
<i>In re Grand Jury Subpoena Duces Tecum</i> , 638 F. Supp. 794, 800 (D Maine 1986)	24
<i>In re Kelly</i> , 350 F.Supp. 1198, 1200 (E.D. Ark 1972)	22
<i>In Re Lysen</i> , 374 F.Supp. 1122, 1123-1124 (N.D. Ill., 1974)	15, 16
<i>In re Melvin</i> , 546 F.2d 1, 5 (1st Cir. 1977)	14
<i>In the Matter of John Doe</i> , 410 F.Supp. 1163 (E.D. Mich 1976)	20, 21, 22, 25
<i>Mallory v United States</i> , 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed 2d 1479 (1959)	21

<i>McNabb v United States</i> , 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed 819 (1943)	21
<i>McPherson v Barksdale</i> , 640 F.2d 780 (6th Cir. 1981)	20
<i>Pillsbury Co. v Conboy</i> , 459 U.S. 248, 103 S.Ct. 608, 614, fn. 14, 74 L.Ed 2d 430 (1983)	19, 23
<i>Santobello v New York</i> , 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed 2d 427 (1971)	20, 21
<i>Shotwell Manufacturing Co. v United States</i> , 371 U.S. 341, 347, 83 S.Ct. 448, 453, 9 L.Ed 2d 357 (1963)	24
<i>Snelling v United States</i> , 719 F.2d 1067, 1068, fn. 3 (10th Cir. 1983)	16
<i>Steagold v United States</i> , 451 U.S. 204, 101 S.Ct. 1642, 1647, 68 L.Ed 2d 38 (1981)	23
<i>Ullman v United States</i> , 350 U.S. 422, 76 S.Ct. 497, 504, 100 L.Ed 2d 511 (1956)	15
<i>United States v Anderson</i> , 778 F.2d 602, 606 (10th Cir. 1985)	16, 17
<i>United States v Cook</i> , 668 F.2d 317, 320 (7th Cir. 1984)	22
<i>United States v Cosby</i> , 601 F.2d 754, 758 (5th Cir. 1979)	13
<i>United States v Dionisio</i> , 410 U.S. 1, 93 S.Ct. 764, 770, 35 L.Ed 2d 67 (1973)	12, 13, 21
<i>United States v Doe</i> , 465 U.S. 605, 104 S.Ct. 1237, 1244, fn. 17, 79 L.Ed 2d 552 (1984)	19
<i>United States v Gonsalves</i> , 675 F.2d 1050, 1055, fn. 9 (9th Cir. 1982)	23
<i>United States v Herman</i> , 589 F.2d 1191, 1200 (3rd Cir. 1978)	18

<i>United States v Hunter</i> , 672 F.2d 815, 818 (10th Cir. 1982)	15
<i>United States v Lenz</i> , 616 F.2d 960, 962 (6th Cir. 1980)	16, 23
<i>United States v Librach</i> , 536 F.2d 1228, 1230 (6th Cir.), <i>cert denied</i> , 429 U.S. 939, 97 S.Ct. 354, 50 L.Ed 2d 308 (1956)	16
<i>United States v McBride</i> , 571 F.Supp. 596 (S.D. Tex 1983)	19
<i>United States v McDowell Contractors, Inc.</i> , 668 F.2d 256, 257 (6th Cir. 1982)	23
<i>United States v Al Mudarris</i> , 695 F.2d 1182, 1185 (9th Cir. 1983)	17
<i>United States v Nixon</i> , 418 U.S. 683, 94 S.Ct. 3090, 3100, 41 L.Ed 2d 1039 (1974)	17
<i>United States v Peister</i> , 631 F.2d 658, 662 to 663 (10th Cir. 1980), <i>cert denied</i> , 449 U.S. 1126, 101 S.Ct. 945, 67 L.Ed 2d 113 (1981)	16
<i>United States v Pellon</i> , 475 F.Supp. at 749	24
<i>United States v Phillips Petroleum Co.</i> , 435 F. Supp. 622, 640 (N.D. Okl 1977)	22
<i>United States v Pinell</i> , 737 F.2d 521, 527 (6th Cir. 1984)	23
<i>United States v Pino</i> , 708 F.2d 523, 530 (10th Cir. 1983)	16
<i>United States v Rodman</i> , 519 F.2d 1058, 1060 (5th Cir. 1975)	21
<i>United States v Smith</i> , 687 F.2d 147, 149 (6th Cir. 1982)	13
<i>United States v Thevis</i> , 665 F.2d 616, 640 (5th Cir. 1982)	18

<i>United States v Turner</i> , 620 F. Supp. 525, 530 (D. Colo., 1985)	17
<i>United States v Wellins</i> , 654 F.2d 550, 552, fn. 1 (9th Cir. 1981)	23
<i>United States v Winter</i> , 663 F.2d 1120, 1133 (1st Cir. 1981), <i>cert denied</i> , 460 L.Ed 2d 479 (1983) ..	16, 17
<i>Wright v United States</i> , 559 F. Supp. 1139, 1150, fn. 8 (E.D.N.Y 1983)	24

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fifth Amendment	1, 5, 6, 8, 23, 24
Title 26	4
Title 28, U.S.C. § 1254	1
18 U.S.C. 2514	15, 16
18 U.S.C. § 6002	2, 5, 7, 8, 9, 10, 11, 15, 16, 17, 19, 20, 23, 24
18 U.S.C. § 6003	2, 5, 7, 8, 9, 10, 11, 15, 16, 17, 19, 20, 23, 24
28 U.S.C. § 1826	3, 8
Rule 41(a), Federal Rules of Appellate Procedure	9

OPINIONS BELOW

DOMNICK JOSEPH SORISE appeals a District Court Order finding him in civil contempt for refusing to answer a question put to him by a Federal Grand Jury in the Eastern District of Michigan. (A-5). The contempt finding of Mr. Sorise was affirmed by the United States Court of Appeals, Sixth Circuit, in the entitled case *IN RE: GRAND JURY SUBPOENA NO. 86-1-52-37 (DOMINIC J. SORISE)*, unpublished and dated December 31, 1986. (A-9-12). The subsequent Motion for Rehearing was affirmed by the United States Court of Appeals for the Sixth Circuit in an Opinion, unpublished and dated January 23, 1987. (A-13-14).

STATEMENT OF JURISDICTION

The Order of Contempt of the United States District Court for the Eastern District of Michigan was issued on November 25, 1986. (A-5). The Opinion of the United States Court of Appeals for the Sixth Circuit, affirming Petitioner's civil contempt citation, was issued on December 31, 1986. (A-9-12). The Opinion on Motion for Rehearing is dated January 23, 1987. (A-13-14). The jurisdiction of this Honorable Court is invoked pursuant to Title 28, U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of

life or limb, nor shall be compelled in any criminal case to be a witness against himself. . .

18 U.S.C. §6002 — (Immunity Generally) provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. §6003 — (Court and grand jury proceedings) provides:

- (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States, or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information

which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment —

- (1) the testimony of other information from such individual may be necessary to the public interest; and
- (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

28 U.S.C. §1826 (Recalcitrant witnesses) provides in pertinent part:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of —

- (1) the court proceeding, or
- (2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

REASONS FOR GRANTING THIS WRIT**A.**

THE QUESTION OF THE RELATIONSHIP THAT THE UNITED STATES ATTORNEY'S OFFICE HAS TO A GRAND JURY BODY AS TO WHETHER OR NOT HE CAN BARGAIN IN THEIR BEHALF AND WHETHER OR NOT AN INDIVIDUAL WITNESS HAS THE RIGHT TO RELY ON THAT BARGAIN, HAS NOT BEEN FORMALLY ANSWERED BY THIS COURT AND IS AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING GRAND JURIES.

STATEMENT OF CASE

Petitioner, DOMINICK JOSEPH SORISE, is an attorney who presently practices as a criminal defense lawyer in St. Clair Shores, Michigan. From April 1, 1979 to April 1, 1982, MR. SORISE was associated and/or partners with W. Otis Culpepper. Upon information and belief, the instant grand Jury is investigating Title 26 ramifications of the filing of personal income tax returns of Mr. Culpepper for the years 1979, 1980, 1981 and/or 1982. On or about April 11, 1986, Petitioner SORISE was served with a grand jury subpoena for his personal testimony and "all records relative to partnership of Culpepper and Sorise since January 1, 1979 to December 31, 1982." (A-16). The grand jury subpoena ordered Petitioner SORISE to appear on April 16, 1986 at 9:15 a.m. (A-16).

On April 16, 1986, Petitioner SORISE appeared, and through counsel, surrendered various law partnership documents (accountant work sheets and tax return papers), and informed Assistant United States Attorney, Jeffrey S. Foran, of his intention to assert his Fifth Amendment privileges to the grand jury. In accordance with discussions at the time between the Assistant United States Attorney and counsel for Petitioner, MR. SORISE was not required to appear before the grand jury and formally assert his privileges. Discussions also revealed that there would be, not only questions regarding office procedures, record keeping, books, income and expenditures, but also questions regarding use of controlled substances by Mr. Culpepper personally, or in the office. Unbeknownst to Petitioner and his counsel, Assistant United States Attorney Foran, through United States Attorney Roy C. Hayes, had made application for an order requiring testimony and information pursuant to 18 U.S.C. §6002-6003, which was granted *ex parte* by United States District Court Judge Avern Cohn on or before April 16, 1986. (A-18-21). THIS ORDER WAS NOT SERVED UPON PETITIONER AND/OR HIS COUNSEL UNTIL A SHOW CAUSE HEARING ON OCTOBER 20, 1986.

Petitioner was requested to appear at the grand jury on May 8, 1986, but the appearance was continued to May 22, 1986. In the interim between May 8, 1986 and May 22, 1986, discussions were held among counsel for Petitioner and Assistant United States Attorney Foran and other members of the United States Attorney's Office. The discussions concerned Petitioner's unwillingness to testify. The focus of the problem was that Petitioner would be obliged to refuse to testify regarding certain areas of the investigation because of the existence of the attorney-client relationship between himself and Mr. Culpepper. The privilege emanated from Petitioner's representation of Mr. Culpepper in divorce proceedings and other matters during the period of their association and/or partnership. There were also discussions as to whether Petitioner had

attorney-client privileges regarding questions pertaining to clients of the law firm during the period of their association and/or partnership. Further, there was a specific discussion that Petitioner would either assert the Fifth Amendment or refuse to testify altogether to any questions regarding use of controlled substances by Mr. Culpepper personally, or in the office. (A-28-29). Petitioner in fact, indicated that he would refuse to testify to any and all questions if he were compelled to respond to any questions other than office procedures, record keeping, books, receipt and disbursement of monies of the former law association and/or partnership. (A-24).

Eventually, due to the complexity of the matter and time limitations of the investigation, Assistant United States Attorney Foran, with the authority of Chief Assistant United States Attorney Thomas A. Ziolkowski, entered into an Informal or "Pocket" Immunity Agreement through certain letters dated May 29, 1986 and June 2, 1986, both of which were in response to an offer of an Informal Use Immunity Agreement, separate and distinct from the formal Order previously issued by District Judge Cohn on April 16, 1986 and not served. (A-23-27). The letter from Assistant United States Attorney Foran dated May 29, 1986, attempted to use as leverage, the unserved April 16 Order to strike an Informal Immunity Agreement. (A-23; A-42-50). Counsel for Petitioner was clearly informed that there was a compulsion order which had been entered with the court and which was available to compel the testimony of Petitioner, but which was not in fact being used. (A-42-50). In response, the June 2, 1986 letter from counsel for Petitioner accepted the offer and sealed the agreement. (A-24).

It was agreed between the parties that the Government would only ask Petitioner questions concerning the bookkeeping and procedures as to how certain monies were handled upon receipt by the former law firm. (A-24). It was also understood by the

parties that the questions concerning the attorney-client privilege would not be compromised. (A-23-24). It was specifically agreed that Petitioner would not be questioned about the use of controlled substances by Mr. Culpepper personally, or in the office. (A-42-50). After the letter by counsel for Petitioner dated June 2, 1986, Assistant United States Attorney Foran responded with a follow-up letter dated June 6, 1986. (A-27). The compulsion order under 18 U.S.C. §6002-6003 was not thereafter served or used at grand jury appearances by Petitioner on May 22, 1986, June 5, 1986, June 17, 1986 and August 8, 1986. At the grand jury appearance of June 5, 1986, the grand jury was informed that Petitioner was testifying pursuant to an Informal Immunity Agreement with the United States Attorney's Office. (A-34-41). In its responsive pleadings in the District Court, the Government stated that "it apprised the grand jury of its informal immunity agreement with Sorise." (A-29). Further, the Government and Petitioner at all times complied with the Informal Immunity Agreement and restricted questions and answers accordingly.

On August 8, 1986, a grand juror, at the very end of questioning, attempted to question Petitioner beyond the scope of the Informal Immunity Agreement with the United States Attorney's Office. Petitioner declined to answer the question put forth by the grand juror based on the Informal Immunity Agreement. On October 20, 1986, Petitioner was again called to the grand jury, and later before District Judge Cohn. (A-30-33). Petitioner maintained that he had complied with his end of the Agreement which included that he would not have to answer questions outside the Agreement. (A-30-33). It was on this date that the Government first and formally served counsel for Petitioner with the compulsion order dated April 16, 1986.

On November 20, 1986, after filing a memoranda, District Judge Cohn ruled that Petitioner must answer or be held in contempt based on the compulsion order pursuant to 18

U.S.C. §6002-6003 dated April 16, 1986. (A-1-4). On November 21, 1986, Petitioner returned to the grand jury and decline to answer the question before the grand jury asserting his Fifth Amendment privileges. Petitioner SORISE asserted his Fifth Amendment privilege based on his position — which was stated on the record to District Judge Cohn on November 25, 1986 — that the original compulsion order pursuant to 18 U.S.C. §6002-6003 had been effectively abandoned by the United States Attorney's Office and superseded by the subsequently employed Informal Immunity Agreement, and that Petitioner had performed in reliance upon the Informal Immunity Agreement in testifying to all other questions before the grand jury. Upon information and belief, Assistant United States Attorney Foran had stated on the record before the grand jury on November 21, 1986, that Petitioner had complied fully and/or in good faith with the Informal Immunity Agreement.

On November 25, 1986, District Judge Cohn found that Petitioner did not have a valid right or just cause to refuse to answer the question of the grand juror regarding Mr. Culpepper's personal use of controlled substances, and found Petitioner in civil contempt pursuant to 28 U.S.C. §1826, based on the compulsion order pursuant to 18 U.S.C. §6002-6003. (A-18-21). District Judge Cohn denied bail and/or stay pending appeal, but allowed Petitioner until December 1, 1986 to obtain bail and/or a stay from the United States Court of Appeals for the Sixth Circuit. (A-5).

On November 26, 1986, Petitioner filed emergency motions and briefs for bail and/or stay, along with a Notice of Appeal. (A-6). On or about November 28, 1986 and December 5, 1986, the Sixth Circuit granted a temporary stay pending further court order and issued an expedited briefing and argument schedule (A-7-8). Briefs and Appendix were filed by December 12, 1986, and argument was heard on December 18,

1986. In a four page *per curiam* opinion by NELSON and NORRIS, Circuit Judges, and PECK, Senior Circuit Judge, dated December 31, 1986, the Sixth Circuit affirmed the District Judge. (A-9-12). Pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, the Sixth Circuit did not issue mandate until January 23, 1987. (A-13-14). However, Petitioner was ordered by the District Judge, over objection, into the custody of the United States Marshal at the Wayne County Jail in Detroit on January 9, 1987.

On or about January 13, 1987, Petitioner filed a Petition for Rehearing along with emergency motions for continuation of stay and/or bail. In a two page *per curiam* opinion dated January 23, 1987, the Sixth Circuit denied the Petition for Rehearing, but granted continuation of stay pending Petition for Certiorari. (A-13-14). Petitioner was released from the Wayne County Jail by order of the District Court on January 23, 1987. (A-15).

REASONS FOR GRANTING THE WRIT

There is no dispute about the following facts. The Government, in its representative capacity for the grand jury, obtained *ex parte* a form use immunity and compulsion order under 18 U.S.C. §6002-§6003 for the testimony of Petitioner DOMNICK JOSEPH SORISE on or before April 16, 1986. (A-18-21). The Government did not serve this order upon Petitioner or his counsel, but rather used it as leverage in discussions, and to negotiate an informal or "pocket" limited use immunity agreement. This limited informal agreement was memorialized by a letter from Assistant United States Attorney Jeffrey S. Foran dated May 29, 1986, a letter from counsel for Petitioner dated June 2, 1986, and a follow-up letter from Assistant United States Attorney Foran dated June 6, 1986, along with a document entitled Immunity Agreement

typed on United States Department of Justice stationary and signed by Chief Assistant United States Attorney, Thomas A. Ziolkowski. (A-25-26).

It was agreed between the parties that the Government would only ask Petitioner questions concerning bookkeeping and procedures as to how certain monies were handled upon receipt by the former law firm. (A-24). It was also understood by the parties that questions concerning attorney-client privilege would not be compromised. (A-24). It was further agreed that the Government would not question Petitioner about the use of controlled substances by former law associate/partner W. Otis Culpepper personally, or in the office. (A-28-29). Petitioner was not given informal immunity on any other questions. (A-27).

The formal use immunity and compulsion order under 18 U.S.C. §6002-§6003 dated April 16, 1986, was thereafter abandoned, not served or used at grand jury appearances by Petitioner throughout the spring and summer on May 22, 1986, June 5, 1986, and June 17, 1986, and August 8, 1986. Upon information and belief, at Petitioner's grand jury appearance on June 5, 1986, the grand jury was informed by Assistant United States Attorney Foran that Petitioner was testifying pursuant to an Informal Immunity Agreement with the United States Attorney's Office. (A-40-41). In responsive pleadings in the District Court, the Government similarly stated that "it appraised the grand jury of its informal immunity agreement with Sorise." (A-29). At the above grand jury appearances, the Government and the Petitioner complied with the Informal Immunity Agreement in questions and answers. Upon information and belief, Assistant United States Attorney Foran also stated on the record before the grand jury on November 21, 1986, that Petitioner had complied fully and/or in good faith with the Informal Immunity Agreement.

However, on August 8, 1986, at the last grand jury appearance involving testimony, and at the very end of questioning, a grand juror attempted to question Petitioner beyond the scope of the Informal Immunity Agreement with the United States Attorney's Office, which Petitioner declined answering. (A-30-33). On October 20, 1986, Petitioner was again called to the grand jury, and later brought before the District Judge, at which date the Government first and formally served Petitioner with the compulsion order dated April 16, 1986. Petitioner maintained, and continues to maintain, that the original compulsion order pursuant to 18 U.S.C. §6002-§6003 had been effectively abandoned by the United States Attorney's Office and superseded by the voluntarily negotiated Informal Immunity Agreement, that Petitioner had performed in good faith reliance upon the Informal Immunity Agreement in testifying to all questions within the scope of the Agreement, and that Petitioner retained his Fifth Amendment rights and privileges regarding any and all questions outside the scope of the Informal Immunity Agreement.

On November 25, 1986, the District Court found that Petitioner was in civil contempt pursuant to 28 U.S.C. §1826 based on the compulsion order pursuant to 18 U.S.C. §6002-§6003 dated April 16, 1986, which was affirmed by the United States Court of Appeals for the Sixth Circuit in opinions dated December 31, 1986, and January 23, 1987. In the above questions, the District Court and the Court of Appeals relied in large measure upon the basic proposition that the grand jury is an investigative body with broad powers and independent of the prosecution and courts. Petitioner admits and accepts as much, but points to the supplementing proposition that the powers of the grand jury are not unlimited and the grand jury itself, is dependent and reliant upon the prosecution and the courts in various respects.

It can almost be stated without citation of authority that "the ancient role of the grand jury . . . has the dual function of

determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions". *Branzburg v Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 2659, 33 L.Ed2d 626 (1972). Because of this historic dual function, the investigative powers of the grand jury are necessarily broad. *Blair v United States*, 250 U.S. 273, 39 S.Ct. 468, 471, 63 L.Ed 979 (1919). Accordingly, This Court has noted the longstanding principle that "the public has a right to every man's evidence" is particularly applicable to grand jury proceedings. *Branzburg v Hayes*, *supra* at 92 S.Ct. 2660. However, This Court prefaced the above principle as follows:

"Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge. . ." *Branzburg v Hayes*, *supra* at 92 S.Ct. 2660.

Similarly, in *United States v Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 770, 35 L.Ed2d 67 (1973), This Court stated:

"This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protection."

The *Dionisio* court then went on to list various constitutional limits on the powers of the grand jury, concluding with the statement that the grand jury may not always serve its "historic role" but must be free to pursue its investigations "so long as it does not trench upon the legitimate rights of any witness." *United States v Dionisio*, *supra* at 93 S.Ct. 773.

From the above, four basic propositions are apparent: (1) that the powers of the grand jury are not unlimited; (2) that grand jury power is not always exercised within its historic dual role; (3) that witnesses retain basic rights before the grand jury; and (4) that the court may serve a supervisory role in grand jury proceedings.

Ours is a system of separation of power, and checks and balances. While rationally conceived and theoretically maintained, the divisions are often blurred by practices and necessity, not only to the casual observer but also to the experienced practitioner. In theory, the grand jury is an investigative body independent of the prosecutor and court. The grand jury, being so independent, acts at the prosecution's direction, but not under its control. *United States v Cosby*, 601 F.2d 754, 758 (5th Cir. 1979). However, it is this practical and necessary reliance on the prosecution and its own powers that has brought the grand jury to be viewed as the arm of the prosecution, or at the very least, as working hand-in-glove with the prosecution. In *United States v Dionisio*, *supra*, at 93 S.Ct. 772, dissenting Mr. Justice Douglas flatly stated:

"It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive."

Similarly, in *United States v Smith*, 687 F.2d 147, 149 (6th Cir. 1982), the Sixth Circuit stated:

"We recognize that grand juries 'are for all practical purposes an investigative and prosecutorial arm of the executive branch of government.' *In Re Grand Jury Proceedings* (Schoofield), 486 F.2d 85, 90 (3rd Cir. 1973)."

The Sixth Circuit went on to give one example of "the practicalities":

"Other authorities have emphasized the practicalities of the relationship between the United States Attorney and the grand jury. For example, the Third Circuit has stated: '[A]lthough grand jury subpoenas are occasionally discussed as if they were instrumentalities of the grand jury, they are in fact almost universally instrumentalities of the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch'". *United States v Smith*, *supra* at 149. (Citation Omitted) (Emphasis Added).

With respect to subpoenas, the First Circuit has added:

“The United States Attorney may obtain subpoenas issued in blank by the court, fill in the blanks, have the witnesses served *without consulting the grand jury*. . .” *In re Melvin*, 546 F.2d 1, 5 (1st Cir. 1977) (Citation omitted) (Emphasis added).

The Ninth Circuit, in turn, has provided a more detailed laundry list of “the practicalities”:

“* * * In theory, the grand jury could function without the prosecutor’s direction and control. * * * However, as a practical matter, in the federal context, it is the prosecutor who provides the initiative and the impetus needed for an effective grand jury investigation. He controls the commencement, pace, direction and scope of the investigation and serves the grand jury in a dual capacity of legal advisor and chief full-time investigator. He decides what witnesses, evidence and information must be subpoenaed. He drafts the subpoena and sets the dates for each grand jury meeting. He conducts the screening interviews with witnesses before they testify. . . . He places witnesses before the grand jury and normally conducts the initial examination. He will secure investigative support for. . . . He will represent the grand jury in any legal proceedings ancillary to the investigation — for example, motions to quash subpoenas in contempt proceedings. He will obtain immunity grants and. . . will ultimately draft the indictment or information, if one is needed.” *Robert Hawthorne, Inc. v Director of Internal Revenue*, 406 F.Supp. 1098, 1119 (E.D. PA 1976).

If the grand jury acts at the prosecution’s direction, but not under its control, the converse is also true, and one of the prosecution’s powers that the grand jury inevitably comes to rely on is the power to seek and obtain immunity. However, the grand jury has no role in seeking immunity and no power to

obtain or confer immunity. See, 18 U.S.C. §6002-§6003. It has long been the law, stated often, and in many different situations, that the prerogative and power to seek or obtain immunity lies exclusively with the executive. See *Ullman v United States*, 350 U.S. 422, 76 S.Ct. 497, 504, 100 L.Ed2d 511 (1956); *Ellis v United States*, 416 F.2d 791, 796-797 (D.C. Cir. 1969). In *United States v Hunter*, 672 F.2d 815, 818 (10th Cir. 1982) (citation omitted), it was stated:

“The power to apply for immunity . . . is the sole prerogative of the government being confined to the U.S. Attorney and his superior officers.”

Not only has the power to seek or obtain immunity been limited to the prosecution, courts have also stated specifically that the grand jury itself does not have the power or discretion to seek immunity. See, *Bursey v United States*, 466 F.2d 1059, 1074 to 1075 (9th Cir. 1972). In *Bursey, supra*, at 1074-1075, there is an interesting discussion of the various factors that “might have” influenced the decision of the United States Attorney regarding immunity, concluding:

“The statute places the burden of determination on a United States Attorney and the Attorney General; it confers no such discretion upon the grand jury.” (Citation omitted).

The current immunity statutes, 18 U.S.C. §6001-§6003, make no provision for the grand jury in the application process and relegate the court to ministerial duties.

The United States Attorney, and no one else, also has the sole discretion to determine the type of immunity to be granted to a witness. In, *In Re Lysen*, 374 F.Supp. 1122, 1123-1124 (N.D. Ill., 1974), the witness complained that he should have been granted transactional immunity under 18 U.S.C. 2514, instead of use immunity under 18 U.S.C. §6002-§6003. The court found that the United States Attorney had the discretion to pick and choose:

"The court's review of Section 2514 and 6002 does not reveal that the use of one section as opposed to the other is mandated in any particular type of investigation. It would appear that Congress intended prosecutors to have sole discretion in determining what type of immunity, if any, would be sought in a particular case. * * * The court is of the opinion that a prosecutor seeking an order conferring immunity upon a witness has sole discretion to determine the type of immunity to be granted."

In *Snelling v United States*, 719 F.2d 1067, 1068, fn.3 (10th Cir. 1983), the court rejected a similar argument, flatly stating:

"The decision to grant or deny immunity is within the sole discretion of the executive branch of the Government. *United States v Lenz*, 616 F.2d 960, 962 (6th Cir. 1980). Inherent in this discretion is the power to decide what type of immunity should be granted. *In Re Lysen*, 374 F.Supp. 1122, 1123 (D.C. Ill., 1974)."

Various court decisions have given the United States Attorney the authority to enter into informal or "pocket" immunity agreements for testimony, information or cooperation without prior court approval. In *United States v Anderson*, 778 F.2d 602, 606 (10th Cir. 1985), the Tenth Circuit pointed out:

"The propriety of issuing informal immunity has been frequently upheld. *United States v Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981), *cert denied*, 460 L.Ed2d 479 (1983); *United States v Librach*, 536 F.2d 1228, 1230 (6th Cir), *cert denied*, 429 U.S. 939, 97 S.Ct. 354, 50 L.Ed2d 308 (1956); See also, *United States v Peister*, 631 F.2d 658, 662 to 663 (10th Cir. 1980), *cert denied*, 449 U.S. 1126, 101 S.Ct. 945, 67 L.Ed2d 113 (1981). Furthermore, defendants have not shown how the use of informal immunity in the present context biased the grand jury. See *United States v Pino*, 708 F.2d 523, 530 (10th Cir. 1983)."

Significantly, in footnote 3, the Tenth Circuit went on to specifically reject the district court's conclusion that informal immunity infringed upon the independence of the grand jury. *United States v Anderson*, *supra*, at F.2d 606, fn.3. Additionally, in *United States v Turner*, 620 F.Supp. 525, 530 (D. Colo., 1985), the court concluded that non-pervasive use of "pocket" or informal immunity did not "interfere, substantially or otherwise, with the independence of the grand jury." In *United States v Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981), the court indicated that there was no statutory language requiring federal prosecutors to follow statutory procedures to confer immunity, and informal immunity need not be reduced to writing or even signed by the recipient. These various decisions appear to stem from the fact that the executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case. See, *United States v Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 3100, 41 L.Ed2d 1039 (1974). Generally, courts will not interfere with this authority, discretion, and any ancillary decisions unless there is a demonstration that the prosecution engaged in flagrant misconduct that deceived the grand jury or significantly impaired its ability to exercise independent judgment. *United States v Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir. 1983).

In the case at bar, the United States Attorney's Office obtained a compulsion order pursuant to 18 U.S.C. §6002-6003 unbeknownst to Petitioner or his counsel. However, the United States Attorney did not attempt to serve the compulsion order or use it prior to the first appearance of Petitioner to testify before the grand jury, but instead engaged in discussions and negotiations with Petitioner and thereafter chose to proceed upon an informal immunity agreement excluding one limited area of questioning. The United States Attorney may have entered into this informal agreement to expedite the investigation, to avoid complex legal questions, to insure testimony in important areas, or for any combination of these

reasons, or for any combination of unknown reasons, or simply because the testimony was available or not needed in the excluded area. Regardless of the particular reason or reasons, the decision was certainly within the sole prerogative and discretion of the prosecution, and not unlawful.

Review of such an immunity decision and agreement of the United States Attorney's Office is not a task congenial to This Court or a trial court, or even judicial function:

"An immunity decision, moreover, would require a trial judge, in order to properly assess the possible harm to public interests of an immunity grant, to examine pre-trial all the facts and circumstances surrounding the government's investigation of the case. Such collateral inquiries would necessitate a significant expenditure of judicial energy, possibly to the detriment of the judicial process overall, and would risk jeopardizing the impartiality and objectivity of the judge at trial." *United States v Thevis*, 665 F.2d 616, 640 (5th Cir. 1982). See also, *Heckler v Chaney*, 105 S.Ct. 1649 (1986).

Moreover, judicial review would raise grave issues of separation of powers:

"Thus, any judicial review of immunity decisions must necessarily trench seriously upon the authority of the executive branch. * * * Both the degree of intrusion and the nature of the proposed decision raised doubts of constitutional magnitude as to whether it is appropriate for a court to take on such a task." *United States v Herman*, 589 F.2d 1191, 1200 (3rd Cir. 1978).

In this context, it is difficult to view an immunity decision as an infringement upon the independence of the grand jury because the United States Attorney had the sole discretion as to whether or not to seek and obtain immunity for a witness in

the first instance. The grand jury cannot complain of infringement because the United States Attorney has sought immunity for one witness and not another. The grand jury should not be heard to complain because the United States Attorney chose to exclude one limited area of questioning to obtain testimony regarding various other areas. Indeed, the prosecution could have limited its application and grant of immunity to the acts of production, identification, and/or authentication of records and documents, as opposed to substantive testimony surrounding their making and keeping. See, *United States v Doe*, 465 U.S. 605, 104 S.Ct. 1237, 1244, fn.17, 79 L.Ed2d 552 (1984). Thus, the grand jury is limited by the fact that it does not have the authority to make immunity decisions, and the fact that it does not have the power to violate the rights of a witness.

In this case, the United States Attorney, in its capacity as representative of the grand jury, and as sole arbiter of the immunity power, chose to make an offer to Petitioner to limit the scope of questioning in an informal immunity agreement. Petitioner's full and faithful compliance and the prosecution's ready acceptance in grand jury appearances throughout the spring and summer, struck and sealed the agreement, bargain, and/or contract, whereby the prior, formal immunity order under 18 U.S.C. §6002-6003 was in effect abandoned, abrogated, and/or superseded. Accordingly, Petitioner retained the right to assert the Fifth Amendment to questions outside the informal immunity agreement. Since Petitioner performed his part under the informal immunity agreement at the costs of testifying against a former associate, (see, *Pillsbury Co. v Conboy*, 459 U.S. 248, 100 S.Ct. 608, 614, fn.14, 74 L.Ed2d 430 (1983)), basic notions of contract law should prohibit the prosecution from holding Petitioner in contempt pursuant to the abrogated immunity order under 18 U.S.C. §6002-6003. See, generally, *United States v McBride*, 571 F.Supp. 596 (S.D. Tex 1983). This case,

however, involves different and more basic considerations than do the garden variety commercial agreements commonly the subject of contract law.

In various parallel situations involving plea bargaining and enforcement of plea and sentence agreements, courts have interpreted *Santobello v New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed2d 427 (1971), as standing for the principal that courts must labor diligently to insure that the bargaining accompanying guilty plea and sentence satisfies the constraints of due process and fundamental fairness. See, *McPherson v. Barksdale*, 640 F.2d 780 (6th Cir. 1981); *Dixon v Alexander*, 741 F.2d 121 (6th Cir. 1984); *In the Matter of John Doe*, 410 F.Supp. 1163 (E.D. Mich 1976). In *Cooper v United States*, 594 F.2d 12, 16-18 (4th Cir. 1979), the Fourth Circuit found that "the constitutional right to 'fairness' to be wider in scope than that defined by the law of contracts" and recognized "a constitutional right to enforcement of plea proposals which may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance on the honor of the government in making and abiding by its proposals".

In the Matter of John Doe, *supra*, appears to be the only case on point to the present situation. A prospective grand jury witness moved to vacate an immunity order on the grounds that "for the grand jury to question him in violation of his agreement with federal agents would violate due process". The witness had surrendered narcotics to federal agents upon assurance that they would ask him no questions. Later the witness was granted immunity from prosecution under 18 U.S.C. §6002-§6003 so that he could testify as part of an inquiry into violations of federal narcotics laws, one topic being the narcotics previously surrendered to federal agents. The prosecution argued that, before the witness could claim a due process violation for a broken promise, he must demonstrate some prejudice or reliance upon it. The record contained no reason for the surrender of narcotics by the witness.

The Court held that “judicial integrity” and the “interests of justice” dictated vacation of that portion of the compulsion order immunizing the witness about questions pertaining to his voluntary surrender of narcotics. Initially, the Court noted its supervisory powers over the grand jury, the framework of judicial integrity and the interests of justice for evaluating agreements with the prosecution:

“Apart from the immunity statute, the court plays a general supervisory role in the fair administration of justice. *United States v Rodman*, 519 F.2d 1058, 1060 (5th Cir. 1975); cf. *Mallory v United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed2d 1479 (1959); *McNabb v United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed 819 (1943). Moreover, the court has a residuum of supervisory power of the Grand Jury and responsibility to curb its improper use. *United States v Dionisio*, 410 U.S. 9, 93 S.Ct. 764, 769, 35 L.Ed2d 67, 73 (1973); *Branzburg v Hayes*, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed2d 626, 643 (1972).

“The framework for evaluating the government’s promise to Doe is provided by cases dealing with promises made in negotiations of guilty pleas, principally, *Santobello v New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed2d 427 (1971). * * *

“This case does not arise in a guilty plea context. However, judicial integrity and ‘the interests of justice’, both themes of *Santobello*, would be offended if the court ratified the government’s broken promise to Doe by reaffirming the immunity order. For whatever reason, Doe agreed to surrender contraband in return for immunity from questioning. Federal agents agreed and accepted the cocaine. The government may not now breach this promise with the court’s aid by substituting immunity from prosecution for immunity for questioning.” *In the Matter of John Doe, supra*, at F.Supp. 1165-1166.

The Court required no showing of prejudice, "apart from that suffered by the administration of justice". *In the Matter of John Doe, supra*, at F.Supp. 1166. Likewise, in *United States v Phillips Petroleum Co.*, 435 F.Supp. 622, 640 (N.D. Okl 1977), the court simply stated:

"When the United States Government gives its word to or makes an agreement with one of its citizens, the Government must be held to that agreement and keeping its promises."

The Court also rejected the prosecution's reliance upon distinctions among express, implied, and apparent authority among its agents in avoiding the fulfillment of its promises, noting that the solution to agents who bargain away the prosecution's rights, is tighter administrative controls within the executive branch. *In the Matter of Doe, supra*, at F.Supp. 1166. In this case, the prosecution has made similar claims, protesting that it did not have the power to limit the grand jury. To the contrary, all authority on point clearly indicates that the prosecution not only has the exclusive power to bargain for immunity, but also to fashion the form of immunity to suit its chosen ends. Regardless, as the Court stated in, *In re Kelly*, 350 F.Supp. 1198, 1200 (E.D. Ark 1972):

"No court could permit the U.S. Attorney or the Justice Department to renege on such a promise (even if not specifically authorized by act of Congress or his supervisors in the Justice Department) without running afoul of Constitutional principles."

Or, as again stated by the court in *United States v Cook*, 668 F2d 317, 320 (7th Cir. 1982):

"The crucial question is not whether the government had authority to carry out the promise . . . , but whether it did in fact make the promise."

Therefore, since the prosecution has the exclusive power to make and fashion immunity agreements, and since the prosecution concedes agreement with and compliance by Petitioner, the only issue that remains is a fair interpretation of the immunity agreement. A fair interpretation of the immunity agreement as set forth on the record below, is that the prosecution abrogated it and/or superceded its own immunity order under 18 U.S.C. §6002-§6003 by negotiating, offering, and accepting a limited informal immunity agreement with Petitioner; that Petitioner complied with the limited informal immunity agreement; and that Petitioner retained his Fifth Amendment privileges as to other questions not within the informal immunity agreement. Accordingly, when Petitioner appeared before the grand jury on November 21, 1986, he had the right to assert his Fifth Amendment privilege to any question outside the informal immunity agreement and the district court judge had no power to revive the immunity order under 18 U.S.C. §6002-§6003 which the prosecution itself had abandoned earlier, in June, 1986.

The district court has no power to extend immunity orders, let alone revive an immunity order which had been abandoned by the prosecution. See, *Pillsbury Co. v Conboy*, *supra* at 103 S.Ct. 616. Indeed, the district court has no inherent power to grant immunity. See, *United States v Pinell*, 737 F.2d 521, 527 (6th Cir. 1984); *United States v Lenz*, 616 F.2d 960,962 (6th Cir. 1980). Moreover, This Court and other courts have held that the prosecution may lose, by assertions, concessions, and acquiescence, or admissions or delay or estoppel, its right to proceed or argue on any given basis. See, *Steagald v United States*, 451 U.S. 204, 101 S.Ct. 1642, 1647, 68 L.Ed2d 38 (1981); *United States v Wellins*, 654 F.2d 550, 552, fn.1 (9th Cir. 1981); *United States v Gonsalves*, 675 F.2d 1050, 1055, fn.9 (9th Cir. 1982); *United States v McDowell Contractors, Inc.*, 668 F.2d 256, 257 (6th Cir. 1982).

Courts have also been willing to provide protection where or when the prosecution has altered or attempted to alter its position regarding a grant of immunity. *In Re Grand Jury Proceedings*, 771 F.2d 143, 148 (6th Cir. 1985 (*en banc*)); *In Re Grand Jury Subpoena Duces Tecum*, 638 F.Supp. 794, 800 (D Maine 1986). Indeed, in *Wright v United States*, 559 F.Supp. 1139, 1150, fn.8 (E.D.N.Y. 1983), the court stated:

“While informal immunity agreements do not provide a witness with statutory use immunity. . . , they do afford the witness the right to estop the government from reneging on the agreement. E.g., *Shotwell Manufacturing Co. v United States*, 371 U.S. 341, 347, 83 S.Ct. 448, 453, 9 L.Ed2d 357 (1963); *United States v Pellon*, 475 F.Supp. at 749.” (Other citation omitted).

In sum, it is Petitioner’s continued position that the prosecution should be burdened with explaining why it should not be foreclosed from proceeding under the immunity order pursuant to 18 U.S.C. §6002–§6003 after it negotiated, offered, and accepted an informal immunity agreement. Second, the prosecution should be compelled to answer why Petitioner is not entitled to specific performance of the informal immunity agreement and his Fifth Amendment privileges to any questions outside the informal immunity agreement. From all of the above, it is hopefully apparent that Petitioner has not been challenging the independence of the grand jury. Rather, Petitioner has been asking the courts below to recognize that the power of the grand jury is not unlimited, and that the rule regarding every man’s evidence is not absolute. Its power is limited by a system of division of powers. The rule has been limited by the Fifth Amendment, the Fourth Amendment in some cases, and by what This Court said in 1919 in *Blair v United States*, *supra*, at 39 S.Ct. 468:

“Some confidential matters are shielded from consideration of policy and perhaps in other cases for *special reasons*

a witness may be excluded from telling all that he knows." (Emphasis added).

As indicated in, *In The Matter of John Doe, supra*, the special reasons in this case are fundamental fairness and the interests of justice.

Respectfully submitted,

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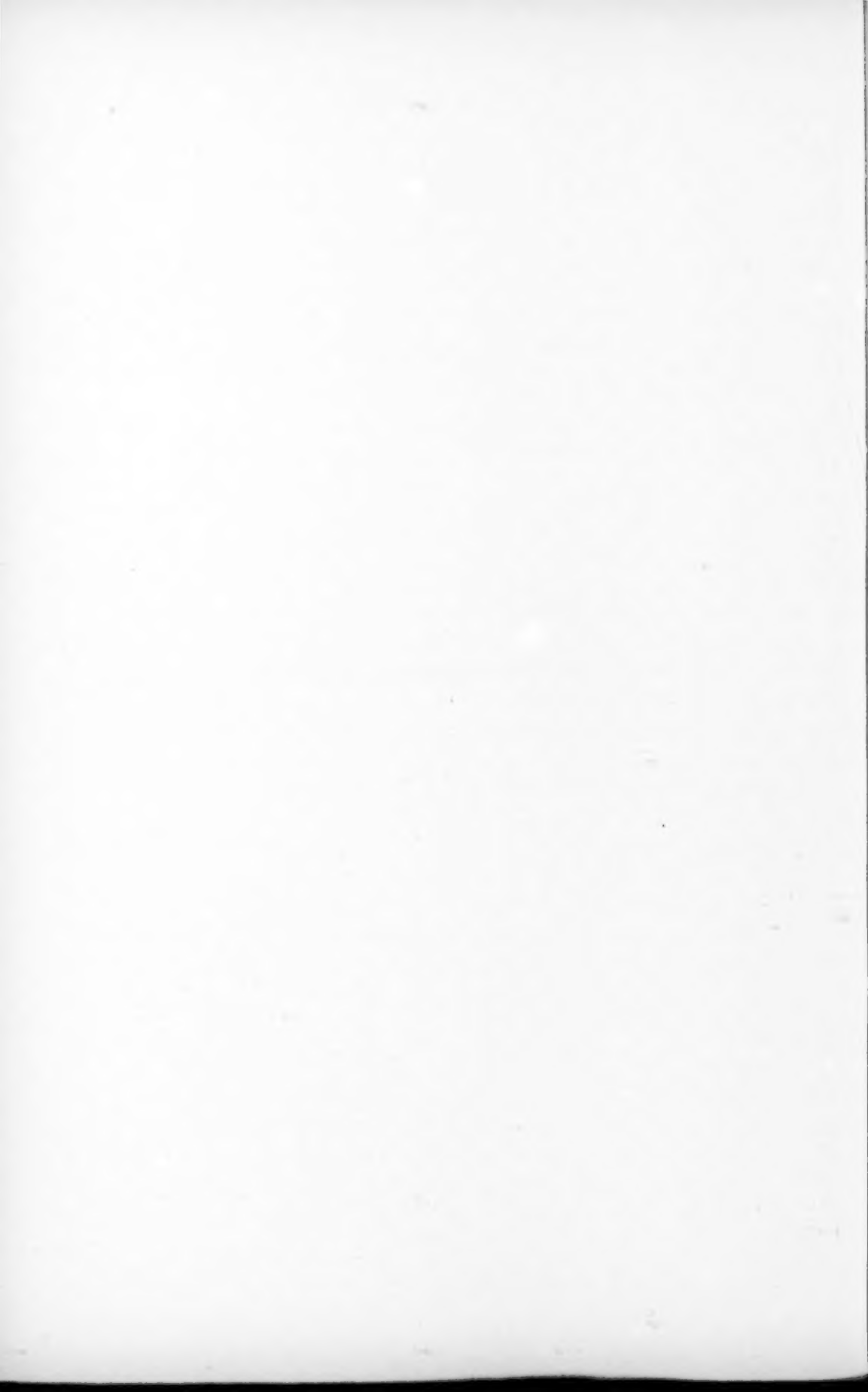
Southfield, Michigan 48075

Phone: (313) 557-6665

Dated: March 12, 1987



PETITIONER'S APPENDIX



**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: GRAND JURY SUBPOENA Misc. No. 86-0451
86-1-52-37

MEMORANDUM

I.

Witness "A" has been called before a grand jury several times to give testimony relating to business activities of his law partnership with "B", who is the subject of an investigation into his tax liabilities for certain years. "A" and the government agree that they entered into an informal "use or fruits" immunity agreement. *See generally* 18 U.S.C. §§ 6001-6005; *Federal Defense Manual: Defending a Federal Criminal Case* § 2.08 (Federal Defenders of San Diego, Inc. 1985). From the papers filed with me, it appears that "A" agreed not to invoke his Fifth Amendment privilege against self-incrimination or the attorney-client privilege (he represented "B" during the period of their law partnership) if the government would not ask questions before the grand jury relating to use of controlled substances by members of the law partnership. The government has not asked such questions, but the grand jury has. "A" has so far refused to answer. Before me is an oral order to show cause why "A" should not be held in contempt for refusing to answer the grand jury's questions.

It should be noted that the agreement not to inquire into controlled substances is not reflected in any document before me, and thus I am left to infer the exact nature of the agreement. It would seem to be a better practice for the government to reduce such agreements to writing so that the witness

understands the scope of the agreement at the time and so that a court, faced with a situation such as the one now before me, will be apprised of the agreement's terms. The current matter could have been avoided by making clear to "A", as discussed below, that the government cannot limit the questions that may be asked by the grand jury itself. If "A" had still refused to testify, the government then had the option of compelling his testimony by a formal grant of immunity under the comprehensive federal statutory immunity scheme. *See* C. Cissell, *Federal Criminal Trials* § 4-6 (1983); *Federal Defense Manual, supra*.^{*} Not to lay all the blame on the government, however, "A" should have known that the government is without power to limit the grand jury's questioning, since "A" is an experienced criminal attorney.

II.

A.

The issue is as follows:

Does a witness who entered into a negotiated immunity agreement with the government concerning his testimony before the grand jury have a right to refuse questions put by a grand juror when the question was specifically excluded by the agreement?

After correctly framing the issue, "A" addresses irrelevant issues in his brief, including the prerogative of the executive branch to determine what type of immunity to offer, how such

^{*} On April 16, 1986, I granted the government's application for an immunity order under 18 U.S.C. § 6003(b). The immunity order was not limited in scope. For reasons not explained, the April 16 order has not been served on "A".

executive discretion does not infringe upon the grand jury, and a witness's right to specific performance of an immunity agreement with the government. The issue here is not the authority of the government or court to grant immunity. Neither does it involve "A"'s right to the benefit of his bargain. The sole issue is the scope of the immunity agreement and whether it can narrow the range of inquiry of the grand jury.

B.

Whatever agreement exists between "A" and the government as to the use of his testimony and the permissible scope of inquiry by the government remains unimpaired by requiring him to answer the grand jury's questions. The grand jury is an investigative body independent of the prosecutor or court. *United States v. Dionisio*, 410 U.S. 1, 16 (1972); *United States v. Udziela*, 671 F.2d 995 (7th Cir.), cert. denied, 457 U.S. 1135 (1982). The grand jury, being independent of both the executive and judicial branches, *Udziela*, acts at the prosecutor's direction but not his control. *United States v. Cosby*, 601 F.2d 754, 758 (5th Cir. 1979). The grand jury has autonomy to exercise substantial control over an investigation, including formulating and asking its own questions. *Matter of Sinadinos*, 760 F.2d 167 (7th Cir. 1985). The grand jury basically has the freedom to pursue its investigation unhindered by external influence or supervision. *In Re Grand Jury*, 446 F. Supp. 1132, 1135 (N.D. Tex. 1978), citing *Dionisio*, *supra*, 410 U.S. at 16-18. A witness may not interfere with the course of the grand jury's inquiry or set limits on its investigation. *Id.*, citing *United States v. Calandra*, 414 U.S. 338, 345 (1973). The grand jury may compel testimony with the help of the court. *In Re Brogna*, 589 F.2d 24 (1st Cir. 1978). Although an informal immunity agreement may bind the government, *United*

States v. Sanderson, 498 F. Supp. 273, 276 (M.D. Fla. 1980), it does not bind a court. *United States v. Hembree*, 754 F.2d 314, 317 (10th Cir. 1985).

Since there is no argument or showing that constitutional or statutory rights of "A" will be violated by compelling him to answer the grand jury's questions, *Dionisio, supra*, he will be found in contempt if he does not cooperate with the grand jury. If any specific questions put by the grand jury impinge on any constitutional or common-law privilege of "A" not to testify, he may assert the privilege at the time of the question. *In Re Grand Jury Proceedings*, 754 F.2d 154 (6th Cir. 1985).

III.

"A" shall be given a second opportunity to answer the grand jury's questions.

/s/

AVERN COHN

Avern Cohn

United States District Judge

Dated: November, 20, 1986
Detroit, MI

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: GRAND JURY

MISC. NO. 86-0451

INVESTIGATION 86-1-52

ORDER OF CONTEMPT

This matter having come before the Court for hearing because of respondents failure to answer a question posed by the Grand Jury, and this Court having reviewed the pleadings, transcripts and having heard the argument of counsel.

It is hereby ORDERED that respondent is hereby found to be in contempt pursuant to 18 U.S.C. 1826 (a) and he is ordered confined in the custody of the United States Marshal. It is further ordered that respondent shall report to the United States Marshals Service in Detroit, Michigan on December 1, 1986, at 3:00 p.m. unless said Order of Confinement is stayed by order of a judge for the United States Sixth Circuit Court of Appeals, Cincinnati, Ohio.

/s/

AVERN COHN

HONORABLE AVERN COHN

United States District Judge

DATED: November 25, 1986

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: GRAND JURY SUBPOENA Misc. No. 86-451
86-1-52-37 CCA# 86-2088

JEFFREY S. FORAN
Assistant United States Attorney

RICHARD M. LUSTIG
Attorney for Respondent

NOTICE OF APPEAL

Respondent hereby appeals to the United States Court of Appeals for the Sixth Circuit from an Order holding Respondent in civil contempt, and denying Respondent's request to Stay said Order Pending an Expedited Appeal therefrom to the Sixth Circuit and from Respondent's Motion for Bail from said Order pending appeal entered November 25th, 1986, and from the Memorandum Opinion dated November 20th, 1986.

Respectfully submitted,

/s/ RICHARD M. LUSTIG

RICHARD M. LUSTIG

Attorney for Respondent

25130 Southfield Rd., Ste. 102

Southfield, Michigan 48075

Phone: (313) 557-6665

Dated: November 26th, 1986

A-7

No. 86-2088

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

IN RE: GRAND JURY SUBPOENA
No. 86-1-52-37

ORDER

The respondent-witness, Domnick J. Sorise, moves the Court to stay an order finding him in contempt for failure to respond to a question put forth by a grand juror in the above-referenced matter; respondent moves in the alternative, for bail pending his expedited appeal from the order of contempt.

Upon review of the cause, the district court's order of contempt is hereby temporarily stayed pending further order of the court.

ENTERED BY ORDER OF THE COURT

/s/

JOHN P. HEHMAN

Clerk

No. 86-2088

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

IN RE: Grand Jury Subpoena
No. 86-1-52-37

ORDER

(Dominick J. Sorise)

Before: JONES and NELSON, Circuit Judges and CELEBREZZE, Senior Circuit Judge.

Respondent moves for bail or a stay pending appeal of the district court's order of November 25, 1986. A temporary stay was granted on November 28, 1986.

It is **ORDERED** that the appeal be expedited and that the stay be continued until further order of the Court.

ENTERED BY ORDER OF THE COURT

/s/

JOHN P. HEHMAN

Clerk

No. 86-2088

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

IN RE: GRAND JURY
SUBPOENA

NO. 86-1-52-37

(DOMINIC J. SORISE)

ON APPEAL FROM
THE UNITED
STATES DISTRICT
COURT FOR THE
EASTERN DISTRICT
OF MICHIGAN.

Decided and Filed _____

BEFORE: **NELSON** and **NORRIS**, Circuit Judges, and
PECK, Senior Circuit Judge.

PER CURIAM. Dominic Sorise appeals a district court order finding him in civil contempt for refusing to answer a question put to him by a federal grand jury. We are satisfied that no answer given by Mr. Sorise would incriminate him, and we shall affirm the judgment of the district court.

Mr. Sorise, a criminal defense attorney, was subpoenaed to testify before the grand jury in connection with its investigation of possible violations of the criminal law by a former law partner. Mr. Sorise was willing to produce certain financial records covered by the subpoena, but he informed the U.S. Attorney's office that he would decline to give oral testimony, either invoking the Fifth Amendment right against self incrimination or asserting that his lips were sealed by the attorney-client privilege. At the request of the U.S. Attorney's office the district court entered an order granting Mr. Sorise use immunity pursuant to 18 U.S.C. §§6002 and 6003. Although Mr. Sorise was told the order existed, the government did not immediately have it served on him. Instead, an Assistant U.S. Attorney negotiated an informal immunity

agreement with Mr. Sorise, under the terms of which agreement Mr. Sorise was to give testimony regarding the law firm's financial records and the U.S. Attorney was not to ask questions about possible use or possession of controlled substances by the ex-partner. This agreement was memorialized in an exchange of letters between Mr. Sorise's attorney and the U.S. Attorney's office.

When Mr. Sorise appeared before the grand jury, the Assistant U.S. Attorney confined his questions to the area agreed on and Mr. Sorise gave testimony on the financial matters as to which he had agreed to testify. On his own initiative, however, the foreman of the grand jury put the following question to Mr. Sorise: "During your relationship with [the ex-partner] in the office or in person, did you ever see any drugs in the office or his use of them outside the office?" Mr. Sorise refused to answer this question on the basis of his Fifth Amendment right and his informal agreement with the government. It does not appear that Mr. Sorise would violate the attorney-client privilege if he answered the question. On November 25, 1986, the district court entered the order from which Mr. Sorise appeals, finding him in contempt for refusing to answer. Mr. Sorise was thereafter served with the original court order granting him use immunity.

There are two questions presented on this appeal. First, could any statements made by Mr. Sorise regarding his observation of any use or possession of drugs by the former partner be used against Mr. Sorise in a later criminal proceeding? Second, was the grand jury bound by the agreement entered into by Mr. Sorise with the U.S. Attorney's office?

We are confident that any statements Mr. Sorise may make before the grand jury on the subject of the ex-partner's use or possession of drugs would be covered by the use immunity order issued by the district court, and thus could not be used against Mr. Sorise in a later criminal proceeding. At oral

argument, moreover, the Assistant U.S. Attorney gave his assurance, as an officer of the court, that the testimony in question would not so be used.

We also conclude that the grand jury was in no way bound by the agreement between Mr. Sorise and the U.S. Attorney's office. The grand jury is an independent body that acts "independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). See also *United States v. Dionisio*, 410 U.S. 1, 16, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), and *United States v. Udziela*, 671 F.2d 995, 999 (7th Cir.) *cert. denied*, 457 U.S. 1135 (1982) ("the grand jury is a constitutional fixture in its own right, belonging to neither the executive nor the judicial branch"). Informal immunity agreements entered into by the U.S. Attorney without the approval of the district court bind only the U.S. Attorney and not the court. *United States v. Hembree*, 754 F.2d 314, 317 (10th Cir. 1985); see also *United States v. Feinberg*, 631 F.2d 388, 391 (5th Cir. 1980) (a promise by a probation officer that a petition to revoke probation would not be filed did not estop the district court from revoking probation). Similarly, an informal immunity agreement entered into by the U.S. Attorney's office on its own behalf cannot serve to bind the grand jury.

No agency relationship existed between the U.S. Attorney and the grand jury, and there is no indication in this case that the grand jury had any prior knowledge of the specific terms of the informal immunity agreement or ratified those terms in any way. Neither is there any indication that anyone from the U.S. Attorney's office encouraged the grand jury to ask Mr. Sorise about use or possession of drugs by the ex-partner. The grand jury was not bound by the terms of the informal immunity agreement, and it was free to put to Mr. Sorise whatever pertinent questions it wanted answered.

Mr. Sorise contends that the court order granting him use immunity was superseded by the informal agreement, that the informal agreement gives him no immunity except as to financial matters, and that any answers to questions about the ex-partner's involvement with drugs could therefore be used to incriminate Mr. Sorise. There is no risk that such testimony will be so used as long as this court sits, however, and Mr. Sorise's strong desire not to testify cannot create a risk of self-incrimination that does not exist.

The judgment of the district court is **AFFIRMED**.

ISSUED AS MANDATE: January 23, 1987

COSTS: NONE

No. 86-2088

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

IN RE: GRAND JURY
SUBPOENA
NO. 86-1-52-37
(DOMINIC J. SORISE)

ON APPEAL FROM
THE UNITED
STATES DISTRICT
COURT FOR THE
EASTERN DISTRICT
OF MICHIGAN.

Decided and Filed January 23, 1987

BEFORE: **NELSON** and **NORRIS**, Circuit Judges, and
PECK, Senior Circuit Judge.

**PER CURIAM. ON PETITION FOR REHEARING
AND STAY OF MANDATE.** In his petition for rehearing,
Mr. Sorise has invited our attention to *United States v. Doe*, 465
U.S. 605 (1984), and has suggested that our opinion of
December 31, 1986, is in conflict with the Supreme Court's
decision in that case.

We find no such conflict. No formal request had been made
for use immunity under 18 U.S.C. §§6002 and 6003 in *Doe*,
and counsel for the government in that case could give no
plausible explanation for the failure to request official use
immunity. The Supreme Court declined to adopt a doctrine
of "constructive use immunity" that would grant protection
"even though the statutory procedures have not been fol-
lowed." 465 U.S. at 616. The situation presented in the case
at bar is quite different; here the government did make a for-
mal request for use immunity, and the district court entered a
formal order granting such immunity. Mr. Sorise contends
that the informal immunity agreement he subsequently nego-
tiated with the U.S. Attorney made the court order an empty

letter, but we reject that contention; the order remains fully effective, in our opinion, and the representations made by the government oral argument simply added frosting to the cake. In view of the existence of the immunity order issued pursuant to formal request, plus the informal immunity agreement, plus the representations made at oral argument, we see no risk whatever that Mr. Sorise would incriminate himself by answering the question put to him by the foreman of the grand jury. Neither do we see any merit in petitioner's other contentions.

Representing that he is applying to the United States Supreme Court for a writ of certiorari, Mr. Sorise also asks for a continuation of bail and/or a continuation of the stay initially granted on November 28, 1986. The petition for rehearing will be **DENIED**, but the request for continuation of the stay will be **GRANTED**, the stay to remain in effect until the United States Supreme Court has acted upon Mr. Sorise's petition for certiorari.

IT IS SO ORDERED, and the Clerk is requested to issue the mandate forthwith.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: DOMINIC SORISE

Petitioner,

Misc. No. 86-0451

ORDER

Pursuant to the Order from the U.S. Court of Appeals for the Sixth Circuit dated January 23, 1987, DOMINIC SORISE is hereby released from the custody of the U.S. Marshal.

SO ORDERED.

/s/ AVERN COHN
AVERN COHN
United States District Judge

Dated: January 23, 1987
Detroit, Michigan

SUBPOENA TO TESTIFY BEFORE GRAND JURY

**UNITED STATES DISTRICT COURT
FOR THE**

86-1-52-8
(Harrah)

to Dominic Sorise

You are hereby commanded to appear in the United States District Court for the District of Michigan at 817 Federal Building in the city of Detroit on the 16th day of April 1986 at 9:15 o'clock A.M. to testify before the Grand Jury and bring with you¹ all records relative to partnership of Culpepper & Sorise since January 1, 1979 to December 31, 1982.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

This subpoena is issued on application of the UNITED STATES OF AMERICA.

ROBERT A. MOSSING

Clerk

By B. GRIFFITH

Deputy Clerk

Date March 11, 1986.

Jeffery Foran

Assistant United States Attorney

817 Federal Building

Detroit, MI 48226 — 313-226-7565

¹ Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN

Received this subpoena at _____ on _____ and
on _____ at _____ I served it on the within
named _____ by delivering a copy to
_____ and tendering² to _____ the fee for one day's at-
tendance and the mileage allowed by law.

Date _____, 19____.

By _____

Service Fees

Travel _____ \$

Services _____

Total _____ \$

² Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof, 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b). Federal Rules Criminal Procedure).

U.S. Department of Justice
Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

April 9, 1986

Honorable Roy C. Hayes
United States Attorney
Eastern District of Michigan
Detroit, Michigan 48226

Attn: Jeffrey S. Foran
Assistant United States Attorney

Re: Grand Jury Investigation
Milton "Butch" Jones, et al.

Dear Mr. Hayes:

Pursuant to the authority vested in me by 18 U.S.C. 6003(b) and 28 C.C.R. 0.175(a) I hereby approve your request for authority to apply to the United States District Court for the Eastern District of Michigan for an order pursuant to 18 U.S.C. 6002-6003 requiring Dominic Sorise to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

/s/

STEPHEN S. TROTT

Stephen S. Trott
Assistant Attorney General
Criminal Division

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: GRAND JURY

MISC. NO. 86-0451

INVESTIGATION 86-1-52

**APPLICATION AND ORDER REQUIRING
DOMINIC SORISE TO TESTIFY AND
PROVIDE INFORMATION**

NOW COMES the United States of America, by and through its attorneys, ROY C. HAYES, United States Attorney, and requests an Order requiring Dominic Sorise to testify and provide information pursuant to 18 United States Code, Section 6002-6003.

1. The United States Attorney hereby states that a duly constituted grand jury of the Eastern District of Michigan, Southern Division, has been inquiring into matters involving controlled substance violations and tax violations.

2. The grand jury investigation has indicated that Dominic Sorise has personal knowledge concerning the violation mentioned above.

3. Dominic Sorise has indicated that he would invoke his Fifth Amendment privilege concerning his knowledge of the above-mentioned controlled substance violations and tax violations.

4. The United States Attorney further states that in his judgement, the testimony and other information requested in this application may be necessary for the public interest of the United States.

5. The United States Attorney further states that this application is made with the written approval of Stephen S. Trott, Assistant Attorney General, Criminal Division, United States Department of Justice, dated April 9, 1986. (see attached).

WHEREFORE, the United States prays that this Court enter an Order pursuant to the provisions of 18 United States Code, Sections 6002-6003, requiring Dominic Sorise to answer questions and to testify and produce evidence relating to the matters under inquiry before the grand jury and at a trial which may result should the grand jury determine that indictments are appropriate.

Respectfully submitted,

/s/

ROY C. HAYES

ROY C. HAYES

United States Attorney

Dated: April 15, 1986

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: GRAND JURY

MISC. NO. 86-0451

INVESTIGATION 86-1-52

ORDER GRANTING IMMUNITY

The United States Attorney for this District having made application under 18 United States Code, Section 6003(b) for an Order requiring Dominic Sorise to testify and provide information information relative to grand jury and trial proceedings which are or may be held in this District and the Court having reason to believe that Dominic Sorise has decided to invoke his privilege not to testify pursuant to the Fifth Amendment of the United States Constitution and the Court having been advised that the United States Attorney believes that Dominic Sorise's testimony is necessary for the public interest and the Court having determined that the Application for Immunity has been properly authorized;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Application heretofore made by ROY C. HAYES, United States Attorney for the Eastern District of Michigan, grant immunity to Dominic Sorise in accordance with Title 18, United States Code, Sections 6002-6003 be in the same hereby is allowed.

IT IS FURTHER ORDERED, that Dominic Sorise testify and answer questions asked by the grand jury and testify and answer questions in the course of any trial which may be held in this District as a result of the grand jury investigation.

IT IS FURTHER ORDERED, that no testimony or other information compelled under this Order, or any information

directly or indirectly derived from such testimony, shall be used against him in any criminal case, except that the said Dominic Sorise shall not be exempted from this Order by prosecution for perjury, giving a false statement, or contempt while giving testimony as ordered herein.

IT IS SO ORDERED.

/s/

AVERN COHN

HONORABLE AVERN COHN

United States District Judge

Dated: April 16, 1986

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT**

(Harrah)

Dominic Sorise

SUBPOENA FOR

☒ Person

☒ Document or Object

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the location, date, and time specified below to testify before the Grand Jury in the above entitled case.

PLACE FEDERAL BUILDING & U.S. COURTHOUSE
231 W. Lafayette
Detroit, MI 48226

COURTROOM 950

DATE AND TIME

May 22, 1986

2:00 P.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):¹

Bring with you all records relative to partnership of Culpepper & Sorise since January 1, 1979 to December 31, 1982.

☐ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK, ROBERT A. MOSSING

DEPUTY CLERK, MARY JEAN LUCAS

DATE May 12, 1986

¹ If not applicable, enter "none."

This subpoena is issued on application of the United States of America by:

ROY C. HAYES

United States Attorney

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Jeffery Foran

Assistant United States Attorney

817 Federal Building

Detroit, MI 48226

PHONE: (313) 226-7565

U.S. Department of Justice

*United States Attorney
Eastern District of Michigan*

Telephone: 313/226-7565

*Federal Building and United States Courthouse
231 W. Lafayette, Eighth Floor
Detroit, Michigan 48226*

May 29, 1986

Richard Lustig
Attorney at Law
25130 Southfield Rd.
Suite 102
Bloomfield, MI 48075

Dear Mr. Lustig:

Please let this letter serve to advise you that I would request Mr. Sorise to return to the grand jury on June 5, 1986 at 9:15 a.m. That is the next available time to continue his examination.

Please also let me attempt to clear up any confusion in our minds regarding the immunity offer to Mr. Sorise. It is my position that the immunity agreement presented to you on May 22, 1986 is the maximum immunity available at the present time. As I am sure you are aware, I do have a compulsion order which has been entered with the Court and is available to compel the testimony of Mr. Sorise. The only situation in which I would consider a broader grant of immunity, is if there would be absolutely no restrictions on the scope and extent of my questions put to Mr. Sorise in front of the grand jury. If that is acceptable to you and your client, then I would suggest further discussions to place into concrete form that

type of agreement. Otherwise at this time, given the restrictions on the scope of my questions, I can provide no further agreement on immunity.

Thank you for your cooperation and I am,

Very truly yours,

ROY C. HAYES

United States Attorney

/s/

JEFFREY S. FORAN

JEFFREY S. FORAN

Assistant United States Attorney

LUSTIG & LUSTIG, P.C.
ATTORNEYS AND COUNSELORS
25130 SOUTHFIELD ROAD, SUITE 102
SOUTHFIELD, MICHIGAN 48075
TELEPHONE (313) 557-6665

RICHARD M. LUSTIG
RONALD A. LUSTIG

June 2, 1986

Mr. Jeffrey S. Foran
Assistant United States Attorney
8th Floor — United States Courthouse
231 W. Lafayette
Detroit, Michigan 48226

Re: Grand Jury Appearance of Domnick Sorise
In Re: Otis Culpepper

Dear Mr. Foran:

I thank you for your letter of May 29th, 1986, indicating the maximum immunity available is that which is recited in the letter handed to me at the Grand Jury Appearance signed by Mr. Ziolkowski and yourself.

If I interpret your letter of May 29th, 1986, correctly, you are agreeing to the proposition put to you by Mr. Kenneth Mogill and myself concerning the nature of Mr. Sorise's testimony on June 5th, that is to say, you will only ask Mr. Sorise questions concerning the bookkeeping, and procedural questions as to how certain monies were handled when received by the Firm. In addition, it is my understanding that you wish to proceed into the keeping of the records and other miscellaneous transactions concerning the receipt of fees by the

Firm. That with this limited scope and extent of your questions, Mr. Sorise will get "pocket immunity" before the Grand Jury.

However, it should be expressly understood that if we believe any of the questions interfere with the attorney-client privilege that Mr. Sorise may have had with Mr. Culpepper, then he will invoke his privilege accordingly.

Thank you for your anticipated cooperation.

Sincerely yours,

/s/ RICHARD M. LUSTIG

Richard M. Lustig

U.S. Department of Justice

*United States Attorney
Eastern District of Michigan*

*Federal Building and United States Courthouse
231 W. Lafayette, Eighth Floor
Detroit, Michigan 48226*

IMMUNITY AGREEMENT

IT IS HEREBY AGREED to by the undersigned parties that in exchange for the limited grant of use immunity set forth below, DOMINIC SORISE will testify truthfully before the Federal Grand Jury and in Federal Court, in the Eastern District of Michigan, and provide any and all information to the Grand Jury and any federal agency, and, if necessary, will testify in any legal proceedings that may arise from or concern the information so provided.

IN RETURN FOR THE ABOVE COOPERATION, the United States of America, in the Eastern District of Michigan, agrees not to use any testimony and information directly or indirectly derived from such testimony in any criminal case except for perjury or false statement or declaration, as indicated below.

IT IS FURTHER UNDERSTOOD between the parties that the failure of DOMINIC SORISE to testify fully and truthfully and to cooperate fully and completely, as described above, will abrogate the above described immunity and any information and testimony provided can be used against him in any subsequent prosecution.

IT IS FURTHER UNDERSTOOD between the parties that nothing in this agreement abrogates the responsibility of DOMINIC SORISE to tell the truth in his testimony before

the Grand Jury and in any other legal proceedings and that such testimony is subject to possible prosecution for perjury and/or false declaration before a Grand Jury, should he knowingly make a false statement. The maximum penalty for perjury is five (5) years imprisonment and/or a \$2,000 fine. the maximum penalty for giving a false statement before a Grand Jury is five (5) years imprisonment and/or a \$10,000 fine.

ROY C. HAYES
United States Attorney

ROSS PARKER
Assistant Chief, Criminal Section

/s/ _____ THOMAS A. ZIOLKOWSKI
THOMAS A. ZIOLKOWSKI
Assistant United States Attorney

JEFFREY S. FORAN
Assistant United States Attorney

Dated: _____

U.S. Department of Justice

*United States Attorney
Eastern District of Michigan*

Telephone: 313/226-7565

*Federal Building and United States Courthouse
231 W. Lafayette, Eighth Floor
Detroit, Michigan 48226*

June 6, 1986

Richard Lustig, Esq.
25130 Southfield Rd.
Suite 102
Bloomfield, MI 48075

Dear Mr. Lustig:

Please let this letter serve to advise you that the next grand jury date in this matter is on June 17, 1986 at 1:00 p.m.

It is my further understanding that prior to that time yourself, your client, myself and the IRS agents will sit down and discuss the various documents that your client will be asked to identify during the course of the grand jury. Please contact my office with several proposed dates that would be most convenient for your schedule.

Thank you for your continued cooperation, and I am

Very truly yours,

ROY C. HAYES
United States Attorney

/s/ JEFFREY S. FORAN

JEFFREY S. FORAN
Assistant United States Attorney

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: GRAND JURY SUBPOENA
86-2-52-37

Misc. No. 86-451

JEFFREY S. FORAN
Assistant United States Attorney

HONORABLE
AVERN COHN

RICHARD M. LUSTIG
Attorney for Respondent

**GOVERNMENT'S RESPONSE TO RESPONDENT'S
MEMORANDUM TO SHOW CAUSE FOR CON-
TEMPT FOR FAILURE TO ANSWER SPECIFIC
QUESTIONS BEFORE THE GRAND JURY**

On April 11, 1986, Domnick Joseph Sorise, was served with a subpoena to testify before the grand jury. The subpoena commanded Sorise to produce all records relative to the partnership of Culpepper & Sorise for the years January 1, 1979 to December 31, 1982. Sorise complied with the subpoena on April 16, 1986.

The Government was later apprised of SORISE'S intent to invoke his Fifth Amendment privilege not to testify and to assert an attorney-client privilege concerning portions of the grand jury investigation. The Government sought and obtained an order granting Sorise immunity under Title 18, United States Code, Sections 6002-6003 which was entered April 16, 1986. Both Sorise and his counsel were apprised of the order by letter dated May 29, 1986 (Respondent's Exhibit C.)

Subsequent to obtaining the order, the Government and Sorise entered into an "informal" immunity agreement. Pursuant to the agreement, the Government agreed to refrain from eliciting testimony from Sorise concerning usage of controlled substances by members of the Culpepper & Sorise partnership. Sorise agreed to forego invocation of this Fifth Amendment privilege not to testify and his attorney-client privilege. The informal immunity agreement was memorialized in a series of letters (Government's Exhibit A) between the Government and Sorise's counsel. The grand jury was not a party to the informal immunity agreement.

Sorise again appeared before the grand jury. The Government apprised the grand jury of its informal immunity agreement with Sorise. The Government, at all times, complied with the informal immunity agreement and restricted its questions accordingly. The grand jury, however, questioned Sorise beyond the restrictions imposed upon the Government by the informal immunity agreement. Sorise refused to respond to the grand jury's questions. The grand jury then sought the Government's assistance in obtaining a contempt order to compel Sorise to testify. In opposing the contempt order, Sorise relied on the informal immunity agreement, claiming that it bound both the government and the grand jury. The Government contends that the informal immunity agreement does not bind the grand jury and that Sorise has failed to show causes as to why he should not be compelled to testify before the grand jury pursuant to the compulsion order.

**UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: GRAND JURY SUBPOENA Misc. No. 86-0451

Proceedings had in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan, on Monday, October 20, 1986.

APPEARANCES:

ROY C. HAYES
United States Attorney

JEFFREY S. FORAN, Esq.
Assistant United States Attorney
817 Federal Building
Detroit, Michigan 48226

Appearing on behalf of
United States of America

LUSTIG & LUSTIG
Suite 102
25130 Southfield Road
Southfield, Michigan 48075

(By Richard M. Lustig, Esq.)

Appearing on behalf of Respondent
Domnick Joseph Sorise

[2]

Detroit, Michigan
Monday, October 20, 1986

THE CLERK OF THE COURT: Grand Jury proceedings, Miscellaneous No. 86-0451.

MR. FORAN: Good morning, your Honor.

For the record, my name is Jeffrey Foran, I am an Assistant United States Attorney appearing in this matter.

MR. LUSTIG: Richard Lustig on behalf of the witness Domnick Sorise, your Honor.

MR. FORAN: Your Honor, this is a Grand Jury investigation, a multi-faceted Grand Jury investigation in this particular instance that brings us before the Court, and involves certain questions regarding an attorney by the name of Otis Culpepper. Just by way of background, Mr. Sorise was a partner of Mr. Culpepper and he was subpoenaed in front of this Grand Jury.

THE COURT: And he's got immunity?

MR. FORAN: Yes, we issued immunity —

THE COURT: You gave him immunity and he won't testify?

MR. FORAN: That is correct.

MR. LUSTIG: No, that's not true. [3] There's more to it than that.

MR. FORAN: Basically what the question is, that was posed, the agreement that I have with Mr. Lustig, which led to the immunity agreement which was obtained after, I believe, after the compulsion order was that I would limit my questions to Mr. Sorise regarding some financial aspects of the business that were pertinent at that time. I agreed that I would not ask questions about use or possession of drugs in the

office during the tenure of his partnership subsequent to that time, and I have not asked that question.

In the last Grand Jury on August 8th, the Grand Jury foreman, who is present in court, posed the question about drug possession and usage in the office.

Mr. Lustig was not present at that time. We agreed to put that off until the next time, which is today, and hoped that we could work it out.

Mr. Lustig and I had spoken on last Friday and we had discussed the fact that I would be able to ask the question whether or not there were more drugs there than just for personal use, did he ever see any quantity present, and that was agreeable to me.

[4]

However, the Grand Jury has again requested that this particular question be posed as there has been some additional testimony in the intervening period of time regarding this subject which makes the question more pertinent to the Grand Jury regarding potential source of income and where income went.

THE COURT: Mr. Lustig.

MR. LUSTIG: Your Honor, the factual sequence of dates is important for your Honor to understand the issue. April 16th you signed an order that was not signed on my client. Instead the Government, through Mr. Foran, as the agent of the Grand Jury, the attorney for the Grand Jury and myself negotiated an agreement where rather than take the contempt that Mr. Sorise wished to do. Mr. Sorise would testify as to the business practices of the partnership and there was a limitation through letter agreements of counsel that that would be limited to that. We went through there and we testified in consideration of our side of the agreement, testified as to those areas which we agreed to do.

We went through the period of time of four, three or four Grand Jury appearances. He

**UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: GRAND JURY SUBPOENA Misc. No. 86-0451

Proceedings had in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan, on Thursday, November 20, 1986.

APPEARANCES:

ROY C. HAYES

United States Attorney

JEFFREY S. FORAN, Esq.

Assistant United States Attorney

817 Federal Building

Detroit, Michigan 48226

Appearing on behalf of United States
of America

LUSTIG & LUSTIG

Suite 102

25130 Southfield Road

Southfield, Michigan 48075

(By Richard M. Lustig, Esq.)

Appearing on behalf of Respondent
Domnick Joseph Sorise

[2]

Detroit, Michigan

Thursday, November 20, 1986

THE CLERK OF THE COURT: Miscellaneous No. 86-0451. In Re: Grand Jury Subpoena.

THE COURT: Mr. Foran, Mr. Lustig, I guess you can sit where you're at.

I have a motion in support of a request for a Closed Hearing. I don't quite understand it, Mr. Foran, because as far as I know the matter that we have to deal with is essentially a matter of law that requires only academic discussion, and I am not aware that in the course of whatever either one of you have to say to me there has to be any reference to anything specifically before the Grand Jury; or we have to use anybody's name or disclose the nature of the inquiry of the Grand Jury.

The question is, as I understand it, may an informal immunity agreement interfere with the ability of a Grand Juror to ask a question, and I don't know that it implicates anything secret or selective or discloses the nature of the inquiry. As I see it, it's purely an academic question. The government has entered into an informal agreement with Mr. A and the Grand Jury wants to ask a [3] question, and Mr. A doesn't want to answer it because he says I have an informal immunity agreement with the government and the Grand Jury says, So what! The government isn't asking you the question and that seems to me a rather scholarly question and involves a rather scholarly discussion and doesn't implicate anything that would require a closed courtroom.

Now if either one of you think that you want to go beyond that I will order not to. This is nothing personal, Mr. Foran or Mr. Lustig, we are dealing with a question of law.

Now in light of that, Mr. Foran, why should I close the courtroom?

MR. FORAN: There is no reason, your Honor.

THE COURT: Mr. Lustig, do you think you can't be comfortable with those limitations on the question before me this afternoon?

MR. LUSTIG: I think the facts were adequately presented in both briefs, your Honor.

THE COURT: But the facts are relevant. The facts are only that there is an immunity, informal immunity agreement that has not been reduced to writing that you two seem to agree upon, and it has these limits and the Grand Jury wants to go [4] beyond it, right?

MR. LUSTIG: I wouldn't frame the issue quite that way but, yes, we don't have to go into the facts — to reply to your question we don't have to go into the facts.

THE COURT: If all these folks in the public gallery are interested in this academic discussion they are welcome to stay. Those who are lawyers presumably will be able to follow it and those that are not lawyers will have some difficulty understanding the jargon; but it's a public place, they are all entitled to be here, and I don't see any reason to close the courtroom.

Mr. Foran.

MR. FORAN: Ready to proceed, your Honor.

THE COURT: Mr. Lustig, do you have anything to add to the brief that you have filed?

MR. LUSTIG: Yes, your Honor.

THE COURT: Come up here and tell me what there is in addition to what you have told me in the brief.

MR. LUSTIG: Your Honor, I only received a copy of the government's reply brief on Monday evening.

[5]

THE COURT: Well, today is Thursday, only Monday evening, that's when I got it, Mr. Lustig.

MR. LUSTIG: Since that time I have done some research and I basically, the understanding from the reply brief is that there was in fact a contract as well as an immunity agreement between the government and the defendant.

THE COURT: What's the difference between a contract and an immunity agreement?

MR. LUSTIG: Well, in this particular case, a contract would be an offer and acceptance and consideration. The consideration given by Mr. Sorise —

THE COURT: Mr. Lustig, I told you you are not to refer to anybody by name.

MR. LUSTIG: I apologize to the Court.

THE COURT: Well, that's the last time I expect that from you, Mr. Lustig.

MR. LUSTIG: Yes, your Honor.

THE COURT: The matter here involves A.

MR. LUSTIG: A, I'm sorry.

The contract as to A was that A would testify —

THE COURT: In a limited area.

[6]

MR. LUSTIG: — in a limited area and he did so in good faith relying on the promise of the government that they would not attempt to secure testimony concerning other areas. In consideration of that he went forth and did that.

Now at the time that he did it he was presented to the Grand Jury and the agreement, as I understand it from the notes that I have, was put before the Grand Jury before he began to testify.

THE COURT: Mr. Foran, is it correct that the Grand Jury was told anything regarding the informal immunity agreement with Mr. A?

MR. FORAN: That is incorrect.

THE COURT: Is there anything in the Grand Jury transcript to show that the Grand Jury was advised of the informal immunity agreement with Mr. A?

MR. FORAN: The Grand Jury was advised of an immunity agreement but not a restriction in questioning.

THE COURT: Do you have the Minutes?

MR. FORAN: Yes, sir.

THE COURT: May I see them?

MR. FORAN: Yes, sir.

Your Honor, the transcript is dated —

[7]

THE COURT: That's all right. I will identify it.

MR. FORAN: Page 3 at the top.

THE COURT: Let me read this to you, Mr. Lustig.

"Q May I please have your name for the record?"

"A A."

"Q Do you recall being in the Grand Jury on an earlier occasion?"

"A Yes."

"Q And at that time you were advised of your rights before the Grand Jury, do you recall that?"

"A That's correct."

“Q Then you understand that subsequent to that time your attorney and I have entered into a use immunity agreement for your testimony here today?”

“A That’s correct.”

“Q And other than that there are no other agreements between us of any kind regarding your testimony, is that correct?”

“A That’s correct.”

“Q Just in terms of my review, it is my [8] understanding that for a period of time, et cetera, et cetera.”

And then we go into substantive matters.

MR. LUSTIG: All right.

THE COURT: So the only thing the Grand Jury knew was that Mr. A had use immunity which meant that the Grand Jury was advised that nothing he said before the Grand Jury could be used against him, is that right?

MR. FORAN: That is correct, your Honor.

THE COURT: That’s the parameters of the Grand Jury’s knowledge of the immunity agreement.

Now proceed from there.

MR. LUSTIG: By presenting that proposition as, first of all, the Grand Jury has presented Mr. Foran as their representative. They hold him out in an almost principal/agent relationship.

THE COURT: That’s not true and there’s no law to that effect any place.

MR. LUSTIG: Your Honor, I would cite to the Court *United States v. Smith* which is a Sixth Circuit case and which is at 687 F.2d 147.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re: GRAND JURY SUBPOENA Misc. No. 86-0451

Proceedings had in the above-entitled matter before the
HONORABLE AVERN L. COHN, Judge of the United
States District Court, Detroit, Michigan, on Tuesday,
November 25, 1986.

APPEARANCES:

ROY C. HAYES

United States Attorney

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(By: Richard M. Lustig, Esq.)

Appearing on behalf of Respondent
Domnick J. Sorise

[2]

Detroit, Michigan
Tuesday, November 25, 1986

THE COURT: Just by number.

THE CLERK OF THE COURT: Miscellaneous No. 86-0451.

MR. LUSTIG: Witness A is ready, your Honor, represented by Richard Lustig.

MR. FORAN: The Government is ready to proceed, your Honor. On behalf of the Government my name is Jeffrey Foran.

MR. LUSTIG: Before we begin, your Honor, I would like to put a few things on the record.

Number one, I understand that the claque behind me is not ours. I want to be sure the Court understands that.

Number two, the last time I was here the Court asked me a question as to whether I was claiming that the Government was in bad faith in some way. Let me indicate for the record that just the opposite occurred the following day and I want to make sure that it is on the record.

THE COURT: I have read the transcript.

MR. LUSTIG: I appreciate that. But I think I owe that to Mr. Foran since I was on the record the [3] last time.

Mr. Foran went beyond the call of duty the following day before the Grand Jury and was extremely fair, and if there was an inference of any bad faith in prior times, my client says that he wishes to withdraw any statement on the record of any such allegation of any bad faith.

THE COURT: Thank you, Mr. Lustig.

I have read the transcript of proceedings before the Grand Jury on Friday, November 21, 1986, and I believe Mr. Foran acted appropriate to his role as an Assistant United States Attorney.

On the other hand, he should neither be condemned nor complimented. He did what any good Assistant United States Attorney would do under the circumstances.

MR. LUSTIG: Your Honor, the other thing I would like to go into is a statement of fact that the Court put on the record the last time through the Opinion and through the subsequent issuance of the Opinion. I want to make sure because there was apparently some misunderstanding as to what occurred. I want to do that before we begin the hearing.

The original factual basis upon which I rested my original case was not that my client was going to give up the attorney/client privilege if he in fact testified, which was in the Opinion. He never did that. He [4] doesn't have the right to give that up. That's obviously the client's privilege.

What it was was he agreed with the Government that he would give them a discussion of the books and records only, and that he would not therefore take any contempt that might have been offered or which was put into contempt. It's important for the record, your Honor, and I'll tell you why in a second.

At any rate, my understanding is that my client appeared before the Grand Jury on Friday and refused to answer the question and I understand the Government now has a Motion.

THE COURT: Well, let me ask you, just so it's absolutely clear.

The Immunity Order has been served on the Respondent, is that correct, Mr. Foran?

MR. FORAN: Yes, your Honor.

THE COURT: So he now has immunity in proper form under the Statute.

MR. LUSTIG: Can I respond, your Honor?

THE COURT: You can say anything you want.

MR. LUSTIG: My understanding of what occurred in this matter is that that Immunity Order was originally entered pursuant to 18 U.S.C. 6001 et seq., and that the Government subsequently superceded that by the [5] agreement which they have agreed to in the reply brief.

THE COURT: I don't think so. There is no substitution.

Mr. Lustig, let me suggest something to you in all fairness.

No matter how you slice it the Respondent in this case has immunity under the Statute. It was authorized by the Attorney General designee, the Assistant Attorney General in charge of the Criminal Division. I signed the Order. I'm satisfied that everything is in proper form and that's where we are and your client has refused, the Respondent has refused to answer a question put by the Grand Jury on the grounds his answer will tend to incriminate him, and as I understand it he has immunity against incrimination.

Now that's where we're at.

MR. LUSTIG: The last time we were here you began the discussion with saying to me that it was a scholarly discussion, we didn't have to discuss the facts and I was allowed to argue the law. Despite that I was given a sort of a chance to argue the law and then the Court made the ruling.

Now today I believe that he is entitled to some representation and I don't believe that the argument is frivolous. I believe —

[6]

THE COURT: Mr. Foran, do you have a Motion?

MR. FORAN: I do, your Honor.

THE COURT: What's your Motion?

MR. FORAN: My Motion, your Honor, is under 18 U.S.C. 1826(a) that the witness be found to be a recalcitrant witness and be ordered confined.

THE COURT: Well, as I see the record now, Mr. Lustig, the Government wants the Respondent held in contempt. He has refused to answer a proper question of a Grand Jury, a proper question, he has immunity and therefore there's nothing left. He either answers the question or suffers whatever there is to be suffered for his refusal. He has no right not to answer that question.

MR. LUSTIG: That's what I would like to argue, your Honor.

THE COURT: What right, what are you basing his right now to answer on?

MR. LUSTIG: May I stand there?

THE COURT: You can stand anyplace you want. But just tell me before you argue what he's basing his right not to answer on.

MR. LUSTIG: If you will give me a chance I would like to make the argument.

THE COURT: I don't want the argument. I want the reason first and then I'll see if I'll let you make [7] the argument. He has to have a reason for not answering. He's pleaded the Fifth Amendment and he has no right to plead the Fifth Amendment.

MR. LUSTIG: In order to get to that point I have to make my argument and then when I get to that point —

THE COURT: No, you tell me why he can plead the Fifth Amendment in face of the immunity granted by Order of the Court.

MR. LUSTIG: Because I believe that the subsequent informal immunity agreement supercedes the original pursuant to our agreement.

THE COURT: Do you have any law to that effect?

MR. LUSTIG: Apparently, your Honor, the only law that I can find is that the Government has agreed in a reply brief that there was in fact a subsequent agreement that supercedes your original —

THE COURT: Do you want him to go back and ask the Assistant Attorney General to reauthorize the immunity? That's all that will happen.

MR. LUSTIG: Yes, your Honor, I would like to make that request because I believe that —

THE COURT: Mr. Foran, why wasn't it, after the Attorney General gave you the right to authorize immunity [8] and you got an Order from me that that Order wasn't vitiated by your subsequent agreement?

MR. FORAN: The agreement that I had with Mr. Lustig was an informal agreement as to me only as Assistant United States Attorney that I would limit the scope of my questions to Mr. A regarding an inquiry of the Grand Jury. That agreement was a separate contractual agreement, a subcontract agreement between Mr. Lustig and myself. That agreement was —

THE COURT: Wholly improper in my judgment, sir, wholly improper. You had an obligation, once you got the authority and I signed the Order to serve it on him and not monkey around. Now that's all that has happened here.

You decided that you didn't want to do that because you thought you could coax him into responding because you were concerned if you went the formal route he would plead the Fifth Amendment or he would be willing to be held in contempt, is that right?

MR. FORAN: That is correct, your Honor.

THE COURT: Is that a fair statement?

MR. FORAN: I believe that is a fair statement.

THE COURT: Were you authorized by anyone to enter into that agreement?

[9]

MR. FORAN: I discussed that matter with other supervisors in the office.

THE COURT: You can't show me any reason, Mr. Lustig, how the Respondent was prejudiced by that arrangement. We're back to square one.

MR. LUSTIG: We have another response.

THE COURT: Tell me how he's prejudiced.

MR. LUSTIG: Detrimental reliance.

THE COURT: How? What?

MR. LUSTIG: Now the Government has what they wanted. They have his testimony under information and belief. The Government has put on the record that he has complied with his part of the bargain.

May I respond? I know you wanted to speak and I was entitled to speak.

The point I am trying to make is that in detrimental reliance upon the Government's promise that he was no longer testifying under the 6001 Immunity Order that he was now testifying under an informal agreement with the Justice Department through the Executive Branch, and the only person that had the right and the authority to give him that kind of an agreement and contract. He testified to everything in the books and records that were asked of him plus other things within the confines of the Grand Jury transcript.